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IN THE
COURT OF APPEALS OF INDIANA

JEFFREY S. HAMAKER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A02-0609-CR-756
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT NO. 2
The Honorable Daniel Pfleging, Judge
Cause Nos. 29D02-0506-FB-106, 29D02-0605-FC-110, and 29D03-0505-CM-195

May 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Appellant-Defendant, Jeffrey Hamaker, appeals his aggregate eleven-year sentence following his consolidated plea of guilty but mentally ill and convictions for Invasion of Privacy as a Class A misdemeanor[1] under Cause No. 29D03-0505-CM-0195 ("CM-195"); Stalking as a Class C felony[2] and Criminal Mischief as a Class D felony[3] in Cause No. 29D02-0506-FB-0106 ("FB-106"); and Stalking as a Class C felony[4] under Cause No. 29D02-0605-FC-0110 ("FC-110"). Upon appeal, Hamaker challenges his sentence by claiming the trial court erred in imposing enhanced and consecutive sentences.

We affirm.

According to the factual basis for Cause No. CM-195 entered during the May 18, 2006 consolidated guilty plea hearing, on May 26, 2005, Hamaker knowingly or intentionally violated the protective order issued on May 13, 2005 by Hamilton County Superior Court 5 in Cause No. 29D05-0505-PO-1334 by contacting his former teacher, Catherine Lott, via e-mail at Carmel High School, where Lott worked. In Cause No. FB-106, on or between May 25 and June 1, 2005, Hamaker knowingly made phone calls to Lott in violation of the May 13 protective order with the intent to terrorize, frighten, intimidate, and threaten her, which caused Lott to feel terrorized, frightened and intimidated. Further, on June 1, 2005, Hamaker drove a truck through Lott's residence

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[1] Ind. Code § 35-46-1-15.1(2) (Burns Code Ed. Repl. 2004).

[2] Ind. Code § 35-45-10-5(a) and (b) (Burns Code Ed. Repl. 2004).

[3] Ind. Code § 35-43-1-2(a)(1)(Burns Code Ed. Repl. 2004).

[4] I.C. § 35-45-10-5(a) and (b).

at 20267 Caphel Lane in Noblesville, and into her family room and kitchen, resulting in approximately $50,000 damage. In Cause No. FC-110, on or between June 1 and June 18, 2005 Hamaker stalked Lott in violation of the aforementioned protective order by sending two letters from the Hamilton County Jail, where he was incarcerated under Cause No. FB-106, to Lott's residence, with the intent to terrorize, frighten, intimidate, and threaten her, which caused Lott to feel terrorized, frightened, intimidated, and threatened.

On May 27, 2005, Hamaker was charged in CM-195 with invasion of privacy. Hamaker was charged on June 1, 2005 in FB-106 with burglary, stalking, criminal mischief, criminal recklessness, and invasion of privacy. In FC-110, Hamaker was charged on August 1, 2005 with stalking and invasion of privacy. On August 3, 2006, Hamaker entered into a plea agreement whereby he agreed to plead guilty but mentally ill to the charges of invasion of privacy in CM-195, stalking and criminal mischief in FB-106, and stalking in FC-110. In turn, the State agreed to dismiss all remaining counts. In that plea agreement, Hamaker agreed to waive his right to a jury trial on any sentencing factors and further consented to the Judge determining the existence of any aggravating factors within his discretion for purposes of increasing the sentence beyond the presumptive sentence.

During an August 3, 2006 sentencing hearing, the trial court found that the aggravators outweighed the mitigators. In FB-106, the court sentenced Hamaker to five years at the Department of Correction for his stalking conviction and to three years executed for his criminal mischief conviction, with those sentences to run concurrently.

In CM-195, the court sentenced Hamaker to one year executed for his invasion-of-privacy conviction, with that sentence to run consecutively with the sentence in FB-106. In FC-110, the court sentenced Hamaker to five years for his stalking conviction, with four years executed and one year suspended to probation, also to be served consecutively with his sentence in FB-106 and CM-195. In pronouncing consecutive sentences, the court stated the following:

> "And even though it's not listed as an aggravator it is something that impacts the sentencing and the Court can make a finding in the determination that the Defendant did commit the Cause No. 106 while he was on bond for the case out of Superior 3, Cause No. 29D03-0505-CM-195 and making that that determination of finding that does require by statute that that sentence, that misdemeanor sentence be served consecutively to any sentence imposed by the Court on the felony cases. I do believe that there is a reason to find that this is an episode of conduct and that while the Defendant was incarcerated on the Invasion of Privacy charge even while incarcerated his conduct in very close proximity thereto involving the same victim committed the offense of Stalking and of Criminal Mischief. And while the Defendant was incarcerated on those offenses additional stalking charges were filed while he was incarcerated. I find this is an episode and because it is an episode I can run the counts consecutive or I can run the sentences somewhat consecutive in [FB-106] and [FC-110]. I am limited to the advisory sentence for the next highest felony." Tr. at 201-02.

Hamaker filed his notice of appeal on August 28, 2006.[5]

Upon appeal, Hamaker first argues that the trial court erred in sentencing him by considering his history of juvenile adjudications, which Hamaker alleges is contrary to

[5] Hamaker's Notice of Appeal listed only "Cause No. 29D02-0506-FC-106." The State points out that Hamaker did not file a separate notice of appeal for each of the cases to which he pleaded guilty and mistakenly cited to "FC-106" instead of "FB-106" in his Notice of Appeal. Given Hamaker's alternating references in the record to both "FB-106" and "FC-106," we assume the references to "FC-106" were inadvertent. Further, because the trial court consolidated both CM-195 and FC-110 with FB-106 for purposes of the guilty plea and sentencing, we will presume that Hamaker's appeal is a proper challenge to these cases as well, in spite of the fact that they were not named in his Notice of Appeal.

Blakely v. Washington, 542 U.S. 296 (2004). Hamaker claims the court's allegedly improper consideration of such adjudications implicates both the enhancement of his sentence and the fact that his sentences were to run consecutively.

Hamaker commited the acts at issue after the April 25, 2005 sentencing amendments providing for advisory sentences.[6] We first observe that pursuant to Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005), cert. denied, 126 S. Ct. 545, our Supreme Court has determined that Blakely does not implicate a trial court's imposition of consecutive sentences so long as the court does not exceed the combined statutory maximums. Additionally, Hamaker consented in his plea to judicial factfinding, one of the permissible means of determining aggravators which does not run afoul of Blakely. See Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005) ("Under Blakely, the trial court . . . may enhance a sentence based only on those facts that are established in one of several ways: (1) as a fact of prior conviction; (2) by a jury beyond a reasonable doubt; (3) when admitted by a defendant; and (4) *in the course of a guilty plea where the defendant has waived Apprendi rights and stipulated to certain facts or consented to judicial factfinding*." (Emphasis supplied)). Further still, Hamaker's argument fails on the merits, as our Supreme Court determined in Ryle v. State, 842 N.E.2d 320, 321-23 (Ind. 2005) that juvenile adjudications were an exception to the requirement that all facts used to enhance a sentence over the statutory maximum must be found by a jury beyond a

[6] The amended versions of Indiana Code §§ 35-50-2-6 and -7 (Burns Code Ed. Supp. 2006) reference the "advisory" sentence, reflecting the April 25, 2005 changes made to the Indiana sentencing statutes in response to Blakely.

reasonable doubt. We therefore conclude Hamaker's challenge to his sentence on Blakely grounds is without merit.

Hamaker's second challenge is to the court's finding that there was an "episode," which Hamaker argues is not supported by the evidence. Hamaker's argument is based upon the erroneous assumption that a trial court may impose consecutive sentences only upon finding an "episode of criminal conduct." In fact, a single aggravating circumstance may support the imposition of consecutive sentences. Smylie, 823 N.E.2d at 686. In finding an episode of criminal conduct, the trial court was limiting its imposition of consecutive sentences, presumably in FB-106 and FC-110,[7] to the advisory sentence of the next highest felony, specifically a Class B felony advisory sentence of ten years.[8] Under the plea agreement, Hamaker faced a potential twenty-year sentence. We deem Hamaker's challenge to his consecutive sentence upon the basis that there was no episode of criminal conduct to be without merit.

Hamaker's third claim upon appeal challenges the trial court's weighing of aggravators and mitigators. In weighing the aggravators and mitigators, the trial court found that the "most crucial" aggravator was the fact that Hamaker had a history of prior criminal conduct. Tr. at 201. The trial court also acknowledged as "somewhat of a

[7] While it appears that the trial court found the acts in FB-106 were committed while out on bond in CM-195, making them, as the court acknowledged, mandatorily consecutive pursuant to Indiana Code § 35-50-1-2(d) (Burns Code Ed. Supp. 2006), it also appears that the court considered the facts in all three causes, CM-195, FB-106 and FC-110, to conclude that there was an "episode of criminal conduct." It also appears, however, that the court's finding of an "episode" resulted in a cap only in the imposition of sentences for FB-106 and FC-110. In any event, the court's finding of an "episode" only served to benefit Hamaker by limiting his sentence.

[8] In its brief the State mentions its "wholehearted" agreement with Hamaker that his crimes did not constitute an episode of criminal conduct. Appellee's Brief at 13.

mitigator" Hamaker's mental illness but found the aggravators outweighed the mitigators. Tr. at 202. Hamaker argues the trial court failed to adequately explain its weighing process. He further argues, based upon his Blakely claim, that the court's finding his criminal history to be an aggravator was in error and that as a result, its finding the aggravators outweighed the mitigators was also in error.

In considering Hamaker's claim, we first observe that a split has emerged in this court as to the manner in which appellate review should be conducted under the post-Blakely advisory sentencing scheme and whether trial courts are required to issue sentencing statements justifying the imposition of any sentence other than the advisory sentence. Compare McMahon v. State, 856 N.E.2d 743, 749 (Ind. Ct. App. 2006) (holding that trial courts are required to issue sentencing statements to support deviation from advisory sentence) with Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006) (holding that trial courts are not required to find, consider, or weigh aggravating or mitigating circumstances under advisory sentence scheme), trans. denied. In any event, the trial court in this case did find, consider, and weigh aggravating and mitigating circumstances, and it further found that the aggravator of criminal history, among other unspecified aggravators, outweighed the slight mitigator of Hamaker's mental illness. Having made these findings, the court imposed an aggravated sentence of five years executed for the Class C felony of stalking and three years executed for the Class D felony of criminal mischief, to be served concurrently, in FB-106; and five years with four of those years executed for the Class C felony of stalking in FC-110 to be served consecutively with the sentence in FB-106. The court also imposed the maximum one-

year executed sentence in CM-195, also to be served consecutively with FB-106.[9] We have already determined that the court's consideration of Hamaker's prior criminal conduct was not an invalid aggravator under Blakely. Given the court's proper consideration of this aggravator and its finding such aggravator to outweigh the mitigator of mental illness, we find no error in its imposition of moderately enhanced and consecutive sentences.

The judgment of the trial court is affirmed.

SHARPNACK, J., and CRONE, J., concur.

[9] It is unnecessary to justify the imposition of the one-year sentence for the Class A misdemeanor, as such sentence is specifically permitted by Indiana Code § 35-50-3-2 (Burns Code Ed. Repl. 2004).